

REMARKS

The present communication is responsive to the Office Action mailed December 24, 2009. A one-month extension of time extending the period of reply from March 24, 2010 up to and including Monday, April 26, 2010 is submitted herewith.

Claims 1, 3-12, and 14-21 are pending in the present application. Claims 1 and 21 are amended and no claims are cancelled or added herein. Therefore, claims 1, 3-12 and 14-21 remain pending in present application. Applicants set forth remarks relating to the Action below.

Applicants thank the Examiner for the indication of allowable subject matter. Claims 9, 12, 14, and 19 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form, including all of the limitations of the base claim and any intervening claims. Instead of amending independent claim 1, for instance, to incorporate the limitations of any of the objected to claims, Applicants, have amended independent claim 1 (as well as independent claim 21) in a different manner and have presented arguments for the allowance of the claims as amended in view of the cited references.

In the Action, the Examiner rejected claims 1, 4, 5, 10, 11, 15-18, 20, and 21 under 35 U.S.C. § 103(a) as being unpatentable over PCT Application No. WO 02/071986 to Grunberg et al. ("Grunberg") in view of U.S. Patent Application Publication No. 2003/0176925 to Paponneau ("Paponneau"), claim 3 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Grunberg in view of Paponneau and further in view of U.S. Patent No. 5,370,697 to Baumgartner ("Baumgartner"), and claims 6-8 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Grunberg in view of Paponneau and U.S. Patent No. 4,566,466 to Ripple et al. ("Ripple").

With respect to the § 103(a) rejection of independent claims 1 and 21 in view over Grunberg in view of Paponneau, the Examiner references Figs. 4a and 4b of Grunberg, the primary reference, asserting that what is shown is an apparatus for distracting an intervertebral space, the apparatus comprising a shaft with sides (402, 404) having at least two distal extensions (407, 409) coupled to the shaft. The Examiner then asserted that it can be seen there is a first trial half 202 with pins 410 coupled at the distal ends of the extensions and a second bifurcated trial half fixed to the plates.

Claims 1 and 21 of the present application recite a bifurcated trial having a first trial half coupled "by a first pin" to a first of the extensions. As clearly shown in Fig. 4b of Grunberg, there is no "pin" that couples trial half 202 to what the Examiner refers to as a distal extension of the apparatus. What the Examiner refers to as "pins 410" on page 3 of the present Action, are referred to as lugs 410 in Grunberg. As described in the specification of Grunberg, lugs 410 are used to hold end plate discs 202 during insertion thereof into the intervertebral space. There is nothing in the specification of Grunberg that teaches that these lugs 410 are used to allow the end plates to pivot with respect to the distal extensions of the apparatus. Further, because each of the distal extensions of the apparatus includes "pins 410" as asserted by the Examiner, neither of end plates 202 can be said to be fixed to one of the distal extensions as recited in claims 1 and 21. To clarify the term "fixed" in claims 1 and 21 of the present application even further, Applicants have amended the claims to recite that the second trial half of the bifurcated trial is fixed to a second of the extensions "such that the second trial half cannot pivot with respect to the second of the extensions." A bifurcated trial having a first trial half coupled by a first pin to a

first of the extensions and having a second trial half fixed to a second of the extensions is clearly not disclosed or taught in Grunberg or Paponneau. Thusly, a *prima facie* case of obviousness cannot be made using the cited references to reject either independent claim 1 or 21.

In light of the foregoing, Applicants respectfully assert amended claims 1 and 21 are unobvious in view of Paponneau and Grunberg. Claims 3-12, and 14-20, depending from amended independent claim 1, are also in condition for allowance, *inter alia* their dependence from an unobvious base claim.

As it is believed that all of the rejections set forth in the Official Action have been fully met, favorable reconsideration and allowance are earnestly solicited.

If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: April 23, 2010

Respectfully submitted,
Electronic signature: /William
A. Di Bianca/
William A. Di Bianca
Registration No.: 58,653
LERNER, DAVID, LITTENBERG,
KRUMHOLZ & MENTLIK, LLP
600 South Avenue West
Westfield, New Jersey 07090
(908) 654-5000
Attorney for Applicants